

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the
License of Carol Miller to Provide
Family Child Care

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATION**

This matter came on for hearing by Administrative Law Judge Allan W. Klein on February 1, 2005, at Waseca County Human Services, 123 Third Avenue NW, Waseca, MN 56093. The record closed at the end of the hearing that day.

Patrick M. Moen, Assistant Waseca County Attorney, 307 N. State Street, Waseca, MN 56093, appeared for the Minnesota Department of Human Services (Department) and Waseca County Social Services (WCSS).

Cheryl Warn, Esq., Allan Hart Caplan & Associates, 525 Lumber Exchange Bldg., 10 South Fifth Street, Minneapolis, MN 55402, appeared for Carol Miller (Licensee).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.^[1] Parties should contact the office of Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, 651-296-2701 to find out how to file exceptions. Since the Commissioner must issue his final order within 10 working days from receipt of the Administrative Law Judge's recommended decision,^[2] the parties are requested to file any exceptions as soon as possible.

Under Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

Should the temporary immediate suspension of Carol Miller's family child care license remain in effect because there is reasonable cause to believe that there is an imminent risk of harm to the health, safety or rights of children in her care?

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee has provided day care in Waseca since 1988. She is well regarded in the community as a day care provider. The Licensee uses a wheelchair because she is paralyzed from the waist down. In recent months her husband and other family members have worked as day care helpers while the Licensee has recuperated from an illness. Licensing authorities performed all background checks necessary to permit the Licensee's husband and family to help out during this time. The Licensee's husband works elsewhere on Wednesdays through Fridays, and he has provided help to the Licensee in operating the day care on Mondays and Tuesdays.^[3]

2. In December 2004 the Licensee was providing care to seven or eight children, all of whom were school age except for a three-year-old and a preschooler.^[4]

3. On December 26, 2004, the parents of a seven-year-old girl in the Licensee's care telephoned the Waseca Police Department to report that their daughter had told them that the Licensee's husband had taken her and another six-year-old girl in care to the garage and showed them a photograph of a naked woman sitting on a rock. The seven-year-old also reported that she had seen other photographs of naked women and that "a long time ago" the Licensee's husband had touched her in the groin area and made her feel uncomfortable. The seven-year-old reported to her parents that the Licensee's husband had asked her to "pinky swear" not to tell anyone these secrets.^[5]

4. On December 27, 2004, a detective from the Waseca Police Department and a child protection social worker conducted a forensic interview with the seven-year-old. In this interview, the girl described the photo in the garage as a woman wearing a bikini that could be peeled back to show that she was naked underneath. The girl repeated the allegation that the Licensee's husband had touched her between the legs.^[6]

5. On that same day, the detective interviewed the Licensee and her husband at their home. The husband immediately took the detective to the garage and showed him a photograph of a woman sitting on a rock wearing a clamshell bikini. The bikini was printed on an acetate overlay, which, when lifted, revealed that the woman was nude underneath. The photograph had been on a cabinet in the back of the garage for approximately 15 years. The husband denied showing the photograph to the seven-year-old or anyone else and denied touching her in the manner described.^[7]

6. The detective and the child protection social worker also interviewed three other girls enrolled in the day care. A six-year-old described a game called "dead kiss, alive kiss," in which the children would kiss the Licensee's husband on the lips and he would play dead, then they would kiss him again and he would be alive.^[8]

7. On December 28, 2004, the Waseca County licensing social worker recommended to the Department of Human Services the temporary immediate suspension of the Licensee's day care license pending completion of the child protection investigation.^[9]

8. On December 28, 2004, the Department issued an Order of Temporary Immediate Suspension to Licensee that was based upon the above information.^[10] The licensing social worker delivered the Order to the Licensee. The Order informed Licensee of her appeal rights.

9. On December 29, 2004, the seven-year-old child reported to her mother that beginning about two years ago, after the girl's brother stopped attending the day care, the Licensee's husband began showing her naked pictures of women's private parts and pictures of naked young boys and girls. The girl told her mother that most of the pictures were kept in the basement of the home, where the Licensee could not find them. She said some of the pictures were on top of a gray filing cabinet in the main room of the basement. In addition, the girl reported that on two occasions, the Licensee's husband had used a video camera and digital camera to take video and photographs of the girl's genital area. This allegedly occurred in a basement bedroom, and afterward the Licensee's husband would download the pictures onto his computer. The girl reported that she had seen many pictures of naked boys and girls on the computer.^[11]

10. The mother reported this information to the Waseca Police Department. On December 30, 2004, the police obtained and executed a search warrant at the Licensee's home. In the basement the police seized a video camera and tapes, a computer tower, several floppy discs and zip disks, some magazines containing sexually explicit photographs, some commercially produced VHS tapes of a sexually explicit nature, and some personal photographs of a sexually explicit nature. None of the photographs, VHS tapes, or magazines examined to date contained sexual images of children, but the Bureau of Criminal Apprehension has not yet analyzed the computer or the computer disks.^[12]

11. Licensee filed a timely appeal of the immediate suspension order. On January 7, 2005, the Department issued a Notice of and Order for Hearing. The Notice of and Order for Hearing was served by mail on the Licensee's attorney on January 18, 2005.

12. On January 7, 2005, the police obtained and executed another search warrant at the Licensee's home. In this search the police seized a camera and film in the Licensee's living room.^[13] The police have not completed their examination of the

camera and film. They anticipate that it will take two to three more months to complete the investigation.

13. The Licensee's husband has not been charged or taken into custody. He remains living at home with the Licensee. The Licensee reports that he is willing to stay out of the house when daycare children are present, and she is willing to obtain a restraining order to preclude his presence at home when daycare children are there.^[14]

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50, 245A.07, and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Pursuant to Minn. Stat. § 245A.07, subd. 2, "[i]f the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license."

4. The scope of this hearing is limited solely to "whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08." The burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program.^[15]

5. The Department demonstrated reasonable cause to believe that the Licensee's husband poses an imminent risk of harm to the health, safety, or rights of persons served by the program, and the temporary immediate suspension should remain in effect pending the Commissioner's final order.

6. The attached Memorandum is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the temporary immediate suspension of the license of Carol Miller to provide family child care be **AFFIRMED**.

Dated this 11th day of February, 2005

S/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape recorded (1 tape). No transcript prepared.

MEMORANDUM

The Department has the burden of showing that there is reasonable cause to believe that the health, safety, or rights of the children in care are in imminent danger. Requiring only a showing of "reasonable cause" is intended to ensure that vulnerable children are protected until there can be a full hearing and a final determination.

In this case, the materials seized from the Licensee's home provide corroboration of some of the statements made by the seven-year-old girl. It is unfortunate for the Licensee that the investigation cannot be completed more quickly, but the safety of the children in care requires that her license be suspended until these serious issues are resolved.

A.W.K.

^[1] Minn. Stat. § 14.61.

^[2] Minn. Stat. § 245A.07, subd. 2a(b).

^[3] Ex. A-1, A-3.

^[4] Testimony of Carol Miller.

^[5] Ex. A-3.

^[6] Ex. A-2, Application for Search Warrant and Supporting Affidavit of Timothy Bourasa, December 30, 2004.

^[7] *Id.*; Testimony of Carol Miller.

^[8] Ex. A-1.

^[9] *Id.*

^[10] Ex. A-4.

^[11] Ex. A-2, Application for Search Warrant and Supporting Affidavit of Timothy Bourasa, December 30, 2004.

^[12] Ex. A-2, Receipt, Inventory, and Return dated December 30, 2004; Testimony of Timothy Bourasa.

^[13] Ex. A-2, Receipt, Inventory, and Return dated January 7, 2005.

^[14] Testimony of Carol Miller.

^[15] Minn. Stat. § 245A.07, subd. 2a.